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FROM NO PROTECTION TO HIGH PROTECTION: THE SUPREME COURT ON COMMERCIAL SPEECH (1942–1976)

The First Amendment to the U.S. Constitution establishes one of the major rights for people in a democratic society: freedom of speech. Throughout American constitutional history, the Supreme Court has provided for a wide interpretation of this Amendment, identifying many different categories of speech, such as: freedom of the press, political speech, artistic speech, defamation, obscenity, and commercial speech. Not all of these categories have been treated equally by the Court, proving various standards of protection for various kinds of speech. Many categories of speech now protected were earlier interpreted as unconstitutional, which meant exclusion from coverage by the First Amendment. Commercial speech is the best example of such a process, therefore it is quite interesting to look at how and why the Supreme Court decided to change the constitutional status of speech which is connected with advertising.

Commercial speech may be understood as speech of any form that advertises a product or service for profit or for a business purpose. In other words, commercial speech proposes commercial transaction.[1] Commercial speech mainly serves to carry information for society concerning the availability and character of particular services and products. In this dimension, members of the society, who are recipients of this kind of speech, become customers, because the main purpose of advertising is to sell goods. Commercial speech is directly connected with consumption and purchasing, which tend to be an indispensable part of the free market. If advertising is so vital for the everyday life of a contemporary society, it has to play a major role in such a country as the United States. However, looking back at the history of protection of commercial speech,[2] we can observe that justices used to treat it for a long time less seriously than other forms of speech, especially between the years 1942–1976. There was even a time when advertising was not considered to be speech at all.[3] An analysis of the development of the status of commercial speech should begin in the early 1940s, when the Supreme Court, for the first time, considered the problem of advertising in the scope of the First Amendment.

In 1942, the Court reviewed the case *Valentine v. Chrestensen*,[4] in which it had to decide upon the constitutionality of a New York law prohibiting distribution of advertising in public. The case concerned a person who attempted to distribute a flyer advertising his submarine tour attraction. On one side of the flyer there was an advertisement for the tour, and on the other a protest against certain New York

[1] J.E. Nowak, R.D. Rotunda, *Constitutional Law*, St. Paul, Minnesota: West Group, 2000, p. 1137.

[2] As a matter of fact, the term "commercial speech" was used by the Supreme Court for the first time in 1973, while deciding the case *Columbia Broadcasting System v. Democratic National Committee*. Justice Brennan, in a dissenting opinion (an opinion opposite to the majority), distinguished "commercial" from "controversial" speech – 412 U.S. 94 (1973).

[3] Caren Schmulen Sweetland, *The Demise of a Workable Commercial Speech Doctrine: Dangers of Extending First Amendment Protection to Commercial Disclosure Requirements*, "Texas Law Review," vol. 76, no. 2, 1997, p. 474.

[4] 316 U.S. 52 (1942).

policies. The police department reviewed the flyer and stated that it violated a statute prohibiting distribution of advertising flyers. Chrestensen was advised he could distribute only the side of the flyer containing the protest. He sued the city to enjoin it from restraining distribution of the two-sided flyer. The state court convicted him of violating the law, but he appealed and the case was finally brought before the highest court in the American judicial system. The Supreme Court reviewed the case and presented a verdict on the issue of whether the application of the law to Chrestensen's activity was an unconstitutional abridgment of the freedom of speech.

Justice Roberts delivered the opinion of the Court, determining that the First Amendment did not apply to restrictions on 'purely commercial advertising.' The New York law was upheld, because distribution of the flyer was considered to be more 'commercial activity,' than a kind of speech:

> (...) This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinions and that, though the states and municipalities may appropriately regulate that privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally sure that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. (...)

The Court, without citing a precedent, historical evidence, or policy considerations, effectively read commercial speech out of the First Amendment.[5] Advertising was thought to be only an economic issue, that should be subject to governmental regulations. But the absence of any explanation for refusing protection of this kind of speech, and defining it as nothing more than commercial activity, meant that the justices did not even try to treat advertising as an important way of expressing someone's views and opinions. The *Chrestensen* decision was followed only a few weeks later by the Court's decision in *Chaplinsky v. New Hampshire*,[6] sustaining a conviction for 'fighting words,' and excluding from the First Amendment certain "well defined and narrowly limited classes of speech, the prevention and punishment of which had never been thought to raise any constitutional problem." Among the mentioned classes were: "the lewd and obscene, the profane, the libelous, and the insulting or fighting words." The absence of advertising from this list of disfavored types of expression seems surprising in view of the close proximity of the two decisions. The anomaly was compounded by the complete absence in the *Chrestensen* verdict of even so rudimentary an explanation for refusing protection as the justices offered a few weeks later, in the specific context of fighting words, for relegating a category of speech to the realm of "least-favored expression."[7] As we can observe, at the beginning of the discussion concerning commercial speech, the American judiciary offered it no constitutional protection.

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[5] M.H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, "George Washington Law Review," vol. 39, 1971, p. 429.

[6] 315 U.S. 568 (1942).

[7] R.M. O'Neil, *Nike v. Kasky. What Might Have Been*, "Case Western Reserve Law Review," vol. 54, 2004, p. 1271.

The same line of reasoning as in *Chrestensen* was presented by justices nine years later in the *Breard v. Alexandria*[8] case, when the Court upheld a municipal ordinance which prohibited canvassers from calling upon the occupants of private residences without having first been invited to do so. A Louisiana salesman, Jack H. Breard, went from house to house selling magazines without prior permission, which was a violation of the state law. While delivering the majority opinion of the Supreme Court, Justice Reed noted, that selling was a purely commercial activity, but at the same time there was no reason to protect it with the First Amendment:

> (...) Finally we come to a point not heretofore urged in this Court as a ground for the invalidation of the Green River ordinance. This is that such an ordinance is an abridgment of freedom of speech and the press. Only the press or oral advocates of ideas could urge this point. It was not open to the solicitors of gadgets or brushes. (...) Thus the argument is not that the moneymaking activities of the solicitor entitle him to go "in or upon private residences" at will, but that the distribution of periodicals through door-to-door canvassing is entitled to First Amendment protection. This kind of distribution is said to be protected because the mere fact that money is made out of the distribution does not bar the publications from First Amendment protection. We agree that the fact that periodicals are sold does not put them beyond the protection of the First Amendment. The selling, however, brings into the transaction a commercial feature. (...)

Once again the highest tribunal in the American judiciary system disregarded advertising as any kind of speech, that could be constitutionally protected.

It is important to mention, however, that there was one justice in the Supreme Court who decided to express his deep concern about the *Chrestensen* verdict. Despite being in the majority[9] in 1942, Justice Douglas did not hesitate to criticize the reasoning of the Court, by delivering a concurring opinion 16 years later in the *Cammarano v. United States* case:[10]

> *Valentine v. Chrestensen* held that business advertisements and commercial matters did not enjoy the protection of the First Amendment, made applicable to the States by the Fourteenth. The ruling was casual, almost offhand. And it has not survived reflection. That "freedom of speech or of the press," directly guaranteed against encroachment by the Federal Government and safeguarded against state action by the Due Process Clause of the Fourteenth Amendment, is not in terms or by implication confined to discourse of a particular kind or nature. It has often been stressed as essential to the exposition and exchange of political ideas, to the expression of philosophical attitudes, to the flowering of the letters. Important as the First Amendment is to all those cultural ends, it has not been restricted to them. Individual or group protests against action which results in monetary injuries are certainly not beyond the reach of the First Amendment (...) A protest against government action that affects a business occupies as high a place. The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive. (...)

While analysing the issue of commercial speech it is impossible not to mention the case in which the Supreme Court decided upon the constitutionality of political

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[8] 341 U.S. 622 (1951).

[9] The ruling in *Valentine v. Chrestensen* was unanimous.

[10] 358 U.S. 498 (1958). A concurring opinion is an opinion that is written by a judge who supports the majority ruling, although he disagrees with the argumentation presented by the Court. Especially justices in the Supreme Court tend to write many opinions that concur with the judgement.

advertisements. It was a famous freedom-of-speech case, *New York Times v. Sullivan*,[11] mainly focusing on another category of speech, a libel. It concerned a full-page advertisement in the newspaper which alleged that the arrest of Martin Luther King, Jr. for perjury in Alabama was part of a campaign to destroy his efforts to integrate public facilities and encourage blacks to vote. L.B. Sullivan, the Montgomery city commissioner, filed a libel action against the newspaper, claiming that the allegations against the Montgomery police defamed him personally. The Supreme Court, holding that the First Amendment protected the publication of all statements about the conduct of public officials, did not reckon purely commercial advertising to this category:

> (...) The publication here was not a "commercial" advertisement in the sense in which the word was used in the Chrestensen case. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. (...)

The Court disavowed any role for economic motivation in its analysis, noting "that the newspaper was paid for publishing the advertisement" and that this was "as immaterial in this connection as the fact that the newspapers and books were sold." The *New York Times* case did not go far beyond the understanding of commercial speech as set out in *Chrestensen*. While the advertisement at issue solicited funds as openly as an advertisement for an ordinary product, the money served political ends, rather than merely financial ones.[12]

The first significant change to the Court's understanding of commercial speech took place in 1975 when the *Bigelow v. Virginia*[13] case was decided. Bigelow, director and managing editor of the Virginia Weekly, was convicted under Virginia law because his newspaper had printed an advertisement for an organization which referred women to clinics and hospitals for abortions. After his appeal, the case was brought to the Supreme Court, in order to investigate the validity of Virginia's law. In the name of the Court, Justice Blackmun stated that it was a mistake to assume that advertising, as such, was entitled to no First Amendment Protection:

> (...) the holding of *Chrestensen* is distinctly a limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is the authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. (...) Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas. (...)Regardless of the particular label asserted by the State – whether it calls speech "commercial" or "commercial advertising" or "solicitation" – a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. (...)

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[11] 376 U.S. 254 (1964).

[12] D.F. McGowan, *A Critical Analysis of Commercial Speech*, "California Law Review," vol. 78, 1990, p. 363.

[13] 421 U.S. 809 (1975).

The decision confirmed the applicability of the First Amendment to the right of consumers to gain access to truthful information about a service that was lawful where it was to be performed.[14] In other words, information expressed in advertisements were seen to have a precious role in society, which acted upon rights and freedoms expressed in the Constitution. In this case, the Court for the first time treated a for-profit advertisement as genuine speech, entitled to the First Amendment consideration on its own merits, rather than disposing of it by referring to *Chrestensen*.[15] The stage was set for another decision that would offer more protection for commercial speech, and the Court did not let people wait for long.

On the 24th of May, 1976, Justice Blackmun delivered the opinion in the *Virginia Pharmacy Board v. Virginia Consumer Council*[16] case, concerning advertising prices of prescription drugs. Acting on behalf of prescription drug consumers, the Virginia Citizens Consumer Council challenged a Virginia statute that declared it unprofessional conduct for licensed pharmacists to advertise their prescription drug prices. On appeal from an adverse ruling by a three-judge District Court panel, the Supreme Court granted the Virginia State Board of Pharmacy a review. The issue before the Court was whether a statutory ban on advertising prescription drug prices by licensed pharmacists is a violation of commercial speech under the First Amendment. It was clearly a case in which commercial speech would gain more interest from the justices, but was it tantamount to gaining constitutional protection? The first part of the majority opinion revealed a new approach to this topic:

> (...) The appellants contend that the advertisement of prescription drug prices is outside the protection of the First Amendment because it is "commercial speech." There can be no question that in past decisions the Court has given some indication that commercial speech is unprotected. In *Valentine v. Chrestensen*, the Court upheld a New York statute that prohibited the distribution of any "handbill, circular or other advertising matter whatsoever in or upon any street." The Court concluded that, although the First Amendment would forbid the banning of all communication by handbill in the public thoroughfares, it imposed "no such restraint on government as respect to purely commercial advertising." Further support for a "commercial speech" exception to the First Amendment may perhaps be found in *Breard v. Alexandria*, where the Court upheld a conviction for violation of an ordinance prohibiting door-to-door solicitation of magazine subscriptions. (...) Moreover, the Court several times has stressed that communications to which First Amendment protection was given were not "purely commercial." (...) Since the decision in *Breard*, however, the Court has never denied protection on the ground that the speech in issue was "commercial speech." (...) Last Term in *Bigelow v. Virginia*, the notion of unprotected "commercial speech" all but passed from the scene. (...) Some fragment of hope for the continuing validity of a "commercial speech" exception arguably might have persisted because of the subject matter of the advertisement in Bigelow. We noted that in announcing the availability of legal abortions in New York, the advertisement "did more than simply propose a commercial transaction. It contained factual material of clear public interest." (...) Here, in contrast, the question whether there is a First Amendment exception for "commercial speech" is squarely before us. (…)

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[14] A.B. Morrison, *How We Got The Commercial Speech Doctrine: An Originalist's Recollections*, "Case Western Reserve Law Review," vol. 54, 2004, p. 1196.

[15] D.F. McGowan, *A Critical Analysis...* op.cit., p. 365.

[16] 425 U.S. 748 (1976).

By referring to the history of commercial speech in the Court's rulings, the justices presented a progressive change in their legal reasoning. Having an opportunity to finally determine the constitutional status of commercial speech, the Court stated:

> (...) Focusing first on the individual parties to the transaction that is proposed in the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. The interests of the Contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome. (...)As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. (...) Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest. (...) Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal. (...)

The holding of the precedent determined that commercial speech was not wholly outside the protection of the First Amendment, and therefore the Virginia statute was invalid. But this verdict meant something more than just for the defendants; it was an example of adapting the law to modern social and economic reality. The Court acknowleged that if the advertiser's interest in a commercial advertisement is purely economic, it does not disqualify him from constitutional protection. This way, both the individual and society may have vital interests in the free flow of commercial information.

The Supreme Court held in the *Virginia Pharmacy* case that speech is reduced to a less-favoured status only when it does no more "than propose a commercial transaction." The Court has thus far relied on "common sense" to differentiate between commercial and noncommercial speech. The two common sense distinctions are: that commercial speech is more verifiable than other types of speech; and that commercial speech is more durable than other types of speech.[17] At the same time the Court decided not to protect every kind of commercial speech, especially false advertising, which has no value and deserves no constitutional protection:

> (...) In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are common sense differences between speech that does "no more than propose a commercial transaction," and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is

[17] D.J. LaFetra, *Kick It Up a Notch: First Amendment Protection For Commercial Speech*, "Case Western Reserve Law Review," vol. 54, 2004, p. 1229.

unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. (...)"

The 1976 opinion concluded that the same interest that supports regulation of potentially misleading advertising – namely, the public interest in receiving accurate commercial information – also supports an interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and nonmisleading commercial messages.[18]

Commercial speech had been treated mostly as commerce and rarely as speech prior to the *Virginia Pharmacy* case.[19] After the case, the state could reach the same policy goals as it chose to reach before, but it could not use the means of prohibiting the dissemination of truthful information about lawful activity. The purpose of this holding was not merely to standardize the interpretation of the First Amendment, but also it wass to encourage more rational majority decision-making and a more open weighing of the advantages and disadvantages of policy alternatives by preventing the use of the commercial speech concept to entirely deny First Amendment protection to an important area of speech.[20] The Court both employed conventional First Amendment analysis in founding its rationale and, in turn, expanded the horizon of free speech. The case is also useful to illustrate the general accommodation of speech values to be made in concrete contexts, such as the commercial area.[21]

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Despite differing opinions about the character of commercial speech,[22] one thing is unquestionable: advertising is now more highly protected by the Constitution. However, we can not say that there are no limits to this protection. The approach to this category of speech is quite different than it used to be before the 1970s; nevertheless, it is not given full protection. Of course the Court has the opportunity to decide a commercial speech case in light of the First Amendment, but at the same time justices may find some circumstances that would remove it from protection. Instead of treating commercial speech as presumptively protected by the Constitution, the Court tends to proceed on the theory that any protection of such speech must be justified. In other words, the justification of the protection is based not on the expressive liberty of the

[18] C.C. Kuhne, *Testing the Outer Limits of the Commercial Speech: Its First Amendment Implications*, "The Review of Litigation," vol. 23, Summer 2004, p. 618.

[19] W.W. Van Alstyne, *First Amendment Cases and Materials*, New York: The Foundation Press, Inc., 1995, p. 683.

[20] J.E. Nowak, R.D. Rotunda, *Constitutional Law*, op.cit., p. 1148.

[21] E.J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, "Case Western Reserve Law Review," vol. 42, 1992, pp. 411–415.

[22] "Commercial speech is often extremely difficult, if not impossible, to identify" – A. Kozinsky, S. Banner, *Who's Afraid of Commercial Speech?* "Virginia Law Review," vol. 76, 1990, p. 631. But: "Commercial speech is not necessarily more verifiable than other speech" – D. Farber, *Commercial Speech and First Amendment Theory*, "Northwestern University Law Review," vol. 74, 1979, pp. 385–386.

speaker, but on the importance of the information to the audience.[23] From no protection to high protection – this is how the history of commercial speech looks throughout the years 1940–1976. Although it has been almost 30 years since the *Virginia Pharmacy* verdict, the holding of this case is still binding.

Advertising can provide useful information – this is what we are all sure of, and it is the real rationale for the case from 1976. While formulating main principles and provisions of the Constitution, as well as the Bill of Rights, the Framers could not imagine that the First Amendment's guarantee of freedom of speech would force the Supreme Court to divide speech into various categories, some of which would suffer from no constitutional protection. Luckily for people involved in commerce, but also for all other 'listeners' (consumers), advertising fell into the category of speech that is protected by nine justices. Any other solution would have become impossible to adapt to contemporary American society and economy.

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